YAMATO TRANSPORT (M) SDN. BHD.

v.

SYARIKAT BUMICHUNG FORWARDING AGENCY

HIGH COURT SABAH & SARAWAK, KUCHING
ELIZABETH M. CHAPMAN JC
[CIVIL APPEAL NO. KG 33 OF 1994/(III)]
2 MAY 1995

PRACTICE & PROCEDURE: *Conditional appearance - Whether a conditional appearance may be entered in the lower Courts - Consideration of O. 1 r. 4(1) & O. 14 r. 5(1) of the Subordinate Courts Rules 1980.*

The appeal before the Court was on the sole question of whether a conditional appearance could be entered in the lower Courts.

Held:

The procedure for defending an action in the lower Courts is specified in O. 14 r. 5(1) of the Subordinate Court Rules 1980 (the Rules) which does not provide for the entry of a conditional appearance. Hence O. 1 r. 4(1) of the Rules which provides for the adoption of High Court procedure in the event of a lacuna in the Rules does not apply.

[Appeal dismissed with costs].

Legislation referred to:

Rules of the High Court 1980, O. 12 rr. 6, 7(1)
Subordinate Courts Rules 1980, O. 1 r. 4 (1), O. 13, O. 14 r. 5 (1)

For the appellant - Yap Yau Sin; M/s. Wan Junaidi & Co.
For the respondents - June Chan; M/s. Matthew Thomas & Liew

JUDGMENT

Elizabeth M. Chapman JC:

The sole issue in this appeal against the decision of the Magistrate is whether a conditional appearance can be entered in the lower Courts. In this connection it is relevant to consider O. 14 r. 5(1) of the Subordinate Courts Rules, 1980 which stipulates that:

> A defendant who disputes his liability for the whole or part of any claim in the action may,
>
> (a) at any time before the return day, serve on the plaintiff a notice of appearance or a defence, as the case may be, for which the notice of appearance appended to the summons may be used; or
>
> (b) appear on the return day and dispute the plaintiff's claim.

Order 1 r. 4(1) of the same provides that:

> In any matter of procedure, or practice not provided for in these rules, the procedure and practice for the time being in use or in force in the High Court shall, as near as may be, be followed and adopted.

Order 12 r. 6 of the Rules of the High Court, 1980 provides that a defendant to an action may, with the leave of the Court enter conditional appearance in Form 16 in the action and O. 12 r. 7(1) applies to application to set aside the writ.

The Subordinate Courts Rules do not provide for the entry of conditional appearance and under O. 14 r. 5(1) the defendant has the option anytime before the return day to serve the plaintiff a notice of appearance or a defence, as the case may be, for which the notice of appearance appended to the summons may be used or appear on the return day and dispute the plaintiff's claim. The procedure is different in the High Court, there being no return day specified in the writ and once served with the writ, the defendant may either enter an appearance or a conditional appearance. Failure to do so may render a judgment in default entered against him (see O. 13).

There are, as can be seen from the Subordinate Courts Rules and the Rules of the High Court, two different modes of defending an action in the lower Courts and in the High Courts. The procedure in the lower Courts is specified in the rules, hence the practice and procedure in the High Court is not applicable and O. 1 r. 4(1) of the Subordinate Courts Rules does not therefore apply. I am also inclined to agree with the argument put forward by Counsel for the plaintiff/respondent that the appellant could have informed the Court on the return day of his dispute as to the jurisdiction of the Court to hear the matter and to request for time to make the necessary application to set aside the plaintiff's summons.

For the reasons given above, I hold that conditional appearance has no place in the practice and procedure of the Subordinate Courts. This appeal is accordingly dismissed with costs, unless agreed, to be taxed.